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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Appellants-Defendants,

vs.

AMERICAN CIVIL LIBERTIES UNION, ET AL.,

Appellees-Plaintiffs.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF *AMICUS CURIAE* OF THE SPEECH COMMUNICATION ASSOCIATION IN SUPPORT OF APPELLEES-PLAINTIFFS

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BRIEF *AMICUS CURIAE* OF THE SPEECH COMMUNICATION ASSOCIATION IN SUPPORT OF APPELLEES-PLAINTIFFS

All parties to this appeal have consented to submission of this *amicus* brief, and their written consents have been filed with the clerk of the Court.

INTEREST OF *AMICUS CURIAE*

The Speech Communication Association ("SCA") is the oldest and largest organization in the United States involved in research, scholarship and teaching within the communication disciplines. The SCA's membership includes over 7100 individuals and 350 academic institutions, encompassing every state in the United States and 26 other countries. The SCA publishes six scholarly journals -- *The Quarterly*

Journal of Speech, Communication Monographs, The Journal of Applied Communication Research, Critical Studies in Mass Communication, Text and Performance Quarterly, and *Communication Education* -- as well as books related to the discipline's research and serial publications aimed at academics and teachers. Founded in 1914, the SCA has evolved into the principal professional organization for scholars, teachers, practitioners and critics of human communication.

The non-profit SCA has a long-standing policy not to engage in political lobbying activities. It is primarily a scholarly and academic organization whose membership spans the political spectrum. However, the SCA is in a unique position to offer a perspective on the technologies of computer-mediated communication. The SCA, as well as its individual members, have extensively studied how people use messages to generate meaning within and across various contexts, cultures, channels and media. The SCA has been at the forefront of research concerning communication in cyberspace, and in studying the attendant effects of this technology upon society. As such, the SCA's perspective may enhance the Court's review of the manner and degree to which the CDA restricts human communication.

SUMMARY OF ARGUMENT

As the leading academic organization engaged in research and scholarship of human communications, the SCA submits this brief in order to assist the Court's evaluation of whether the CDA is the "least restrictive means" of achieving Congress' goals.

Two facts distinguish the media targeted by the CDA from the communications media at issue in previous cases. First, the Internet and related forms of computer-mediated communication provide individuals and small organizations with the unprecedented ability to participate in communication processes more actively than ever before possible. And second, these new technologies have an extraordinary and unique ability to create and facilitate ongoing, back-and-forth discourse and debate.

In these respects, the Internet and computer-mediated communications represent a fundamental break from earlier methods of electronic communication. The "broadcast" model of communication, in which a limited number of centralized speakers transmit static content to recipients is simply inapplicable to this new media. Instead, computer-mediated communications represent the next step in the evolution of electronic communication. Participants can react and respond to the communications of others by creating and distributing their own communications that comment upon, criticize or build upon the earlier communications. These actions, and the ongoing discourse they create, can occur spontaneously and inexpensively. As a result, for the first time, almost any citizen can interact and engage in discourse instantaneously with hundreds or thousands of other citizens and debate the issues of the day.

These aspects of computer-mediated communication have a profound constitutional significance. The Framers conceived of the First Amendment as a means to facilitate the ability of citizens to debate issues of public concern. Participatory citizen discourse on matters of public interest lies at the very core of the First Amendment. Thus, in analyzing the constitutionality of the CDA, the Court must consider the degree to which the CDA restricts actual discourse among citizens.

In drafting the CDA, the government simply imported regulations developed in the context of broadcast media and similar technologies. However, the computer-mediated communications targeted by the CDA implicate somewhat different constitutional values than those implicated by earlier media. The Court's previous review of indecency regulations concerning broadcast media and cable TV did not require extensive consideration of the effect of those regulations upon actual back-and-forth discourse and debate, nor did those cases implicate the ability of individual citizens to disseminate their constitutionally-protected expression to the public at large.

Here, the CDA unnecessarily and severely restricts the ability of individual citizens to participate in the discourse so essential to the Framers' conception of the First Amendment. As a result, the CDA cannot survive strict scrutiny.

ARGUMENT

THE CDA SUBSTANTIALLY AND UNNECESSARILY RESTRICTS TWO CORE FIRST AMENDMENT VALUES: CITIZEN PARTICIPATION AND BACK-AND-FORTH INTERACTIVE DISCOURSE

A. The Participatory And Interactive Nature Of Computer-Mediated Communication Represents The Next Step In The Evolution Of Electronic Communication

The computer-mediated communications at issue in this suit differ *qualitatively* from the media at issue in the indecency cases relied upon in the Government's brief. These qualitative differences do more than merely distinguish *Pacifica*, *Sable*, *Denver Area* and similar cases, and require a careful examination of the CDA's effect on core First Amendment values.

Computer-mediated communications represent two vitally important technological and societal developments. For the first time, each citizen partially has the ability to communicate his or her views directly, simultaneously and nearly instantaneously to millions upon millions of other citizens. Moreover, computer-mediated communications encourage discourse -- that is, back-and-forth multilateral communications -- to a far greater extent than previous methods of mass communication.

As the district court discussed in detail, the new technologies of e-mail, listservs, newsgroups and the World Wide Web provide tens of millions of computer users with a variety of inexpensive and easily accessible methods to engage in communication with a large group of people who would otherwise be unreachable. J.S. App. 16a-32a ¶¶ 12-48, *ACLU v. Reno,* 929 F. Supp. 824, 832-38 (E.D. Pa. 1996). Participants

can rapidly combine text, graphics, audio and video elements into a single message, and then exchange their messages spontaneously with thousands of other participants, all without the mediation or editorial discretion of centralized authorities. Each of these facts empowers individuals and small organizations and stimulates rapid back-and-forth discourse. The broadcast model of mass communication, in which citizens merely have access to information provided by a relatively small number of large, centralized media entities, simply does not apply to this new technology. *See* J.S. App. 44a-46a, 929 F. Supp at 843-44.

These technologies represent a return to the Framers' underlying conception of the First Amendment. To the Framers, the expression of individual citizens had paramount significance for the First Amendment, and formed an essential element of our constitutional system:

> When the Framers thought of the press, they did not envision the large, corporate newspaper and television establishments of our modern world. Instead, they employed the term "the press" to refer to the many independent printers who circulated small newspapers or published a writer's pamphlets for a fee. It was in this form . . . that much of the most important and characteristic writing of the American Revolution occurred.

McIntyre v. Ohio Elections Commission, 514 U.S. __, 131 L. Ed. 2d 426, 448 (1995) (Thomas, J., concurring) (citations and internal quotations omitted); *see also Lovell v. City of Griffin,* 303 U.S. 444, 452 (1938). The Framers intended the First Amendment's protection of "the freedom of speech, and of the press" to guarantee and stimulate discourse among the citizenry, and not merely to protect the editorial judgments of the media. As stated in Judge Cooley's early treatise on constitutional law:

> The evils to be prevented [by the First Amendment] were not the censorship of the press merely, but any action of the government by means of which it

> might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.

Thomas McIntyre Cooley, 2 *Constitutional Limitations,* at 886 (8th ed. 1927).

Despite the Framers' concern that the First Amendment function as a means for a broad spectrum of citizens and organizations to participate in public dialogue, in recent years technological and economic realities have made it difficult, if not impossible, for individuals to share their messages with large segments of society. In *Miami Herald*, for example, the Court restated many of the arguments regarding the historical trend towards the concentration of media ownership into the hands of a few entities:

> [T]he press of today is in reality very different from that known in the early years of our national existence. . . . Newspapers have become big business, and there are far fewer of them to serve a larger literate population. Chains of newspapers, national newspapers, national wire and news services, and one-newspaper towns are the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events. . . .
>
> The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper's being owned by the same interests which own a television station and a radio station, are important components of this trend toward concentration of control of outlets to inform the public.
>
> The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion.

Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 248-50 (1974); *see generally* Jerome Barron, *Access To The Press -- A New First Amendment Right*, 80 Harvard L. Rev. 1641, 1643 (1967) ("[A] comparatively few private hands are in a position to determine not only the content of information but its very availability").

The intervening decades since *Miami Herald* have only exacerbated the concentration of media power in the hands of a few large entities. In 1995, only 1,710 daily newspapers and 513 weekly periodicals were published in the U.S.[1] Most daily newspapers are owned by large chains.[2] During 1992, only 49,276 new books were published in the U.S.[3] In broadcasting, only 1,145 licensed commercial television broadcasting stations, 5,109 commercial FM radio stations, and 4,913 commercial AM radio stations were in operation within the U.S. during 1994.[4] Broadcasting has followed the model of newspapers, and is experiencing enormous consolidation of ownership of local radio and TV stations into the hands of a few large companies.[5] In the cable realm, in which the cable

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[1] *See* U.S. Dep't Of Commerce, *1995 Statistical Abstract Of The United States*, at 579 (Table No. 917). In 1900, in contrast, over 2,226 daily newspapers and 1,493 weekly periodicals were published in the U.S. *See* U.S. Dep't Of Commerce, *Historical Statistics Of The United States: Colonial Times To 1970*, at 809 (Table Nos. R224-R231).

[2] By 1986, the five largest newspaper chains controlled 27% of daily newspaper circulation in the U.S., while only 23% of newspapers remained independent. Lucas Powe, *The Fourth Estate And The Constitution,* at 202 (1991). "Chain" ownership of newspapers was virtually nonexistent in 1900. *Id.*

[3] U.S. Dep't Of Commerce, *1995 Statistical Abstract Of The United States*, at 580 (Table No. 921). This total includes both entirely new works and new editions of previously published books.

[4] U.S. Dep't Of Commerce, *1995 Statistical Abstract of the United States*, at 571 (Table No. 897).

[5] During 1996, there were over 1,115 mergers and acquisitions involving TV and radio stations, representing $25.362 billion in transactions. *Special Report: 1996 Station and Cable Trading,* Broadcasting & Cable Magazine, at 19 (Feb. 3, 1997). The Telecommunications Act of 1996

(Footnote continued)

provider generally has a local monopoly, six companies control 60% of American cable households.[6]

This is not to say that there is anything inherently wrong with consolidation in the mass media. However, the Court has previously acknowledged some of the special advantages that corporations,[7] public officials and public figures enjoy in public discourse, and some of the institutional disadvantages faced by individuals.[8] As a practical matter, individual citizens have largely been prevented from participating in mass communications. Most public discourse in America has therefore been conducted through media "proxies." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389 (1969) (describing "proxy" role of broadcasters in public debate); *see Turner Broad. Sys., Inc. v. FCC*, 512 U.S. __, 129 L. Ed. 2d 497, 526-27 (1994) (noting "gatekeeper" role of cable operators in controlling content of public debate).

However, the computer-mediated communications targeted by the CDA represent a fundamental break with previous forms of mass media. No longer must the First Amendment take into account the concepts of "proxies" and "gatekeepers" for public discourse or "limited spectrum space." Instead, these new technologies permit free speech doctrine to return

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eliminated many previous limitations on broadcast ownership and made it far easier for large media conglomerates to purchase previously-independent radio and television stations.

[6] *Warren Publishing's 1996 Cable And Station Coverage Atlas*, at 4-5 (1996).

[7] *See Austin v. Michigan Chamber Of Commerce*, 494 U.S. 652, 659 (1990) (noting ability of corporations to "use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace"); *Austin*, 494 U.S. at 691 (Scalia, J., dissenting) (noting that media corporations have more opportunity and power to distort public debate and corrupt political process than non-media defendants).

[8] *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-45 (1974) ("Public officials and public figures usually enjoy significantly greater access to the channels of effective communication . . . than private individuals").

to the Framers' original conception of the First Amendment as a means to ensure and facilitate the ability of individual citizens to express their views to other citizens.

In addition to providing individual citizens with the means of mass communication, computer-mediated communications share a second quality distinguishing them from previous forms of media. Newsgroups, listservs and Web sites all stimulate back-and-forth multilateral discourse and dialogue to an extent never before seen. Newsgroups and listservs, for example, are "open discussions and exchanges on particular topics." J.S. App. 23a-24a ¶ 25, 929 F. Supp. at 834. Similarly, the "hyperlinks" between Web sites permit one Web site to comment upon, criticize or develop information contained on another Web site, creating a single fluid and interconnected body of discourse. *See* J.S. App. 25a-32a ¶¶ 33-48, 929 F. Supp. at 836-38. In these respects, the Internet has evolved in much the same way as the Court described the evolution of universities, as "voluntary and spontaneous assemblages or concourses for [citizens] to speak and to write and to learn." *Rosenberger v. University of Virginia*, 515 U.S. __, 132 L. Ed. 2d 700, 719 (1995).

Communication scholars have long acknowledged the qualitative distinction between modes of unilateral communication (such as the broadcast media) and modes of multilateral communication (such as the telephone and computer-mediated communications). The term "communication" has its roots in "communiatus," which is the Latin word for "sharing" and originates in the early Catholic tradition of sharing the Sacrament of the Holy Eucharist. Communication scholars generally define "communication" as ways in which meaning is shared between individuals or among a community. *See* Jamieson & Campbell, *The Interplay of Influence*, at 3 (1997); Rudolf Verderber, *Communicate*, at 4 (1987). Technologies used to communicate can either enhance or inhibit the ability to share meaning. Broadcast media, for example, can provide a message to a large number of people at once, but provide the broadcaster with only limited ability to share and understand the meaning received by the audience. The

telephone, in contrast, extends face-to-face communication in that immediate reactions to what is said will change the nature of what is said subsequently.

Computer-mediated communications represent the next evolutionary step in communications technology, extending the discourse of telephone communication, rather than that of the more static model of broadcast communication. Even though information is available to be accessed by a large number of people, the receivers of that information now have means to provide immediate reactions to the providers of the information. For example, if one accesses information or opinions that one finds offensive, or if one has additional information, opinions or context to add to the original information, one can so communicate to the person who provided the information as well as to the others who have accessed the original information. The originator of the information also has the ability to communicate directly in return. This type of multilateral, reciprocal communication creates a transactional process of sharing meaning and generates the dialogue and discourse so essential to the Framers' conception of the First Amendment.

In computer-mediated communication, messages tend to engender a great deal of direct interchange. Once an initial message has been sent and its meaning shared by others, discourse develops that can lead in many directions before the discussion is done. *See* Shank and Cunningham, "Mediated Phosphor Dots" in *Ess' Philosophical Perspectives on Computer-Mediated Communication*, at 30 (1996). Everyone interested in the message can jump in and add a voice to debate, challenge, change, reject or extend the original message. New discussions may spring forth, and other topics may be added. Discourse begets discussion and greater discourse -- and potentially, resolution. The end result is very close to the ideal of the marketplace of ideas envisioned by Justice Holmes. *See Abrams v. United States* 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting); *see also* Fraleigh and Tuman, *Freedom Of Speech In The Marketplace Of Ideas*, at 397 (1997). Moreover, discourse itself creates community though not in

the traditional sense of communities created by geographic boundaries. Instead, the ebb and flow of discourse allows Internet users to form communities around common interests, interact while they find such interaction to be valuable, and then disperse.

First Amendment principles recognize that participatory, multilateral discourse has a special constitutional significance. Multilateral debate and discourse are the very core of the First Amendment, which embodies a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964). As Professor Chafee has noted, there are many ambiguities in determining what the Framers intended the First Amendment to mean, but there "can be no doubt" that their conception encompassed an unrestricted right to engage in free discussion and debate on matters of public interest. Zechariah Chafee, *Free Speech In The United States,* at 19 (1941). Even if the debate touches upon controversial topics, the very fact that back-and-forth discourse is taking place serves the purposes of the First Amendment: "Any word spoken . . . that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom -- this kind of openness -- that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this . . . often disputatious society." *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508-09 (1969).

The Court has acknowledged that encouraging dialogue and discourse presents a constitutionally significant value completely separate from a speaker's right to speak. *See Board of Education v. Pico*, 457 U.S. 853, 866 (1982) ("Our precedents have focused not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas") (*quoting First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978));

Pacific Gas & Elec. Co. v. California Public Utilities Comm'n, 475 U.S. 1, 8 (1986) ("The constitutional guarantee of free speech serves significant societal interests wholly apart from the speaker's interest in self-expression. By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information").

As discussed in more detail in Section B of this *amicus* brief, and in the briefs of the ACLU and ALA appellees, the CDA substantially restricts this multilateral discourse. Computer-mediated communication is *interactive* in a way and on a level not approached by past technologies, including the telephone. Moreover, the discourse so characteristic of the Internet distinguishes this medium from the unilateral communications at issue in *Pacifica* and *Sable*.[9] In these prior cases, the Court needed to address only one aspect of the First Amendment -- a speaker's right to speak and a citizen's right to receive that speaker's message. Here, however, a somewhat different constitutional value is involved -- the creation and facilitation of public discourse, and the right of the public to participate in this discussion without unnecessary government restrictions. *Sable,* for example, involved pre-recorded, for-profit dial-in services that provided only one-way messages to purchasers. *Sable Communications v. FCC*, 492 U.S. 115, 117-18 (1989). These dial-in recordings provided none of the debate or dialogue present in Usenet newsgroups, e-mail, listserv mailing lists, or even Web sites. Similarly, radio and TV broadcasting and cable TV all involve unilateral communication from programmers to recipients whose role is essentially limited to choosing whether or not to access the programming. In *Denver Area*, for example, the Court distinguished

[9] The Court has previously rejected governmental attempts to use the rationale developed in the broadcasting context to regulate expression in other forms of media not subject to broadcasting's technological limitations. *See Pacific Gas & Elec. Co. v. California Public Utilities Comm'n*, 475 U.S. 1, 10 n.6 (1986) (*citing Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 543 (1980)).

cable subscribers, programmers and cable operators as three separate and distinct groups. *See Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. __, 135 L. Ed. 2d 888 (1996). The Court discussed subscribers solely as accessors of programming and discussed cable operators as those who provide, select and deliver individual programs. Because there was essentially no immediate interaction between these groups, there was no need to address the degree to which the statute restricted back-and-forth discourse.

Internet participants, in contrast to the audiences for cable TV and broadcast media, are not merely passive accessors of information provided by others. In fact, Congress determined that the Internet constitutes a fundamental departure in the nature of public debate, and codified this determination as part of the statute:

> (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and information resources to our citizens.
>
> (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
>
> (3) The Internet and other interactive computer services *offer a forum for a true diversity of political discourse,* unique opportunities for cultural development, and myriad avenues for intellectual activity.

CDA § 509, *codified at* 47 U.S.C. § 230(a) (emphasis added).

Despite Congress' unambiguous recognition of the Internet's unique ability to stimulate true multilateral debate, the Government fails to address the CDA's inhibiting effect upon discourse. Instead, the Government focuses only upon

whether consumers still have a reasonable opportunity to obtain commercial pornography. *See* Gov't Brief at 19, 28, 39-40. The Government simply does not address, nor did Congress seriously consider, the CDA's effect on back-and-forth multilateral discourse.

B. The CDA Unnecessarily Restricts Participation By Individual Citizens In Interactive Debate And Discourse

The severe criminal penalties of the CDA will have their greatest effect on the most revolutionary aspects of the Internet: the participation of ordinary citizens and the Internet's role as a forum for spontaneous, unmediated back-and-forth discourse. Requiring participants to perform credit card checks, obtain adult access codes, or "tag" their messages before daring to communicate with fellow users will completely transform this new medium. Because Congress imported the CDA's restrictions from the unilateral broadcast model of communication, the CDA will force the Internet to fundamentally transform its fluid, participatory multilateral nature in order to fit within the more static model of broadcast media.

The CDA creates substantial barriers to individuals who wish to participate in discourse on the Internet. As the district court found, and as discussed in the ACLU and ALA's briefs, the CDA's requirements of credit card checks and adult access codes will financially burden users. J.S. App. 53a-56a ¶¶ 97-107, 929 F. Supp. at 846-47. The Court has already held that imposing additional financial costs upon a speaker constitutes a "penalty on the basis of the content," and inevitably leads speakers to avoid controversial topics, thereby "dampen[ing] the vigor and limit[ing] the variety of public debate." *Miami Herald*, 418 U.S. at 256-57; *see Rosenberger*, 515 U.S. at __, 132 L. Ed. 2d at 715 ("the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression") (*citing Simon & Schuster, Inc. v. Members Of N.Y. State Crime Victims Board*, 502 U.S. 105, 115 (1991)).

The CDA's "tagging" requirement presents additional concerns. As the district court found, tagging does not currently exist, and would require several developments before becoming a reality. J.S. App. 56a-58a ¶¶ 108-16, 929 F. Supp at 847-48. And as discussed in the ACLU and ALA's briefs, the CDA's vague concept of "indecency" provides insufficient guidance for any workable tagging system. Moreover, by requiring ordinary citizens to categorize and label their speech before participating in public discourse, the CDA burdens those speakers merely because they have chosen to communicate on controversial topics. *See e.g., Rosenberger*, 515 U.S. at __, 132 L. Ed. 2d at 719; *McIntyre v. Ohio Elections Commission*, 514 U.S. __, 131 L. Ed. 2d 426, 441-42 (1995); *see also Interstate Circuit, Inc. v. City Of Dallas*, 390 U.S. 676 (1968). Tagging, credit card checks and adult-ID requirements also impose administrative and recordkeeping burdens that are themselves constitutionally suspect. *See e.g., Austin v. Michigan Chamber Of Commerce*, 494 U.S. 652, 658 (1990) (recordkeeping and administrative requirements burdened expressive activity).

After carefully evaluating the particular technologies at issue, the district court concluded that credit card verification, adult access codes, and adult personal identification numbers are effectively unavailable for non-commercial, not-for-profit entities. J.S. App. 61a ¶ 122, 929 F. Supp. at 849. As a result, the CDA will prevent these entities (which obviously include most individual citizens) from participating in discourse on the Internet. Ultimately, the threat of imprisonment and the burden and expense of credit card checks, adult-access verification procedures and "tagging" will force ordinary citizens[10] and small, non-commercial entities from communicating on topics that might conceivably be considered to fall within the vague concept of "indecency." *See Miami Herald*, 418 U.S. at 256-58 (right-of-reply requirement would deter newspapers from speaking out in the first instance); *Pacific Gas*, 475 U.S.

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[10] Because individual citizens, but not corporate entities, can be imprisoned, the CDA discourages individuals from participating.

at 10 (discussing *Miami Herald*). In contrast, the alternatives set forth in the district court's opinion will have a much less restrictive effect upon both back-and-forth discourse and upon citizen participation in such discourse.

More fundamentally, the CDA seeks to transform the nature of communication on the Internet. Congress based the CDA's regulations on the more static model of communication derived from broadcast cases such as *Pacifica*. As such, the CDA simply ignores the multilateral, fluid and participatory model of communication applicable to the Internet. The CDA's burdens will only work if: (1) Internet participants have only a small number of previously-prepared messages to communicate; (2) Internet participants can evaluate the content and context of their messages in advance in order to determine whether they may be indecent; and (3) Internet participants have the time and resources to identify and prescreen the recipients of each of their communications. These assumptions, while appropriate for the broadcast model of communication, are inapplicable to the rapid interaction that characterizes more fluid models of communication.

Each of the burdens imposed by the CDA substantially reduces the Internet's ability to provide spontaneous back-and-forth discourse. These burdens are premised upon the notion that a few central authorities who have the resources to comply with the CDA will transmit static, predetermined, and generally pre-recorded messages to passive recipients. Performing credit card checks or requiring adult access codes from the recipients of communications are inconsistent with the spontaneous back-and-forth flow of discourse. These requirements will particularly inhibit the rapid flow of dialogue when applied to newsgroups, Internet relay chat, listservs, and similar forums for discussion.

The government's brief fails even to consider the CDA's effect on interactive discourse. Instead, the government considers only one aspect of the CDA's restrictiveness, namely whether the CDA leaves open reasonable opportunities to disseminate and receive indecent material. *See* Gov't Brief at 19,

28, 39-40. However, analysis of the restrictiveness of the CDA requires consideration of the CDA's effect on two additional values that lie at the core of the First Amendment, namely, how the CDA restricts discourse, and how the CDA restricts the ability of citizens to participate in this ongoing discourse. The government fails to address these issues for the simple reason that Congress did not seriously consider the CDA's effect on these constitutional values. Congress' entire approach to drafting the CDA, and the government's argument on this appeal, are both premised on an inapplicable model of communication.

The district court examined several effective alternatives to the CDA that place control in the hands of the recipients of communications that are less restrictive than the CDA. J.S. App. 23a-42a ¶¶ 40-73, 929 F. Supp. at 838-43. Editorial decisions made by the recipient of a communication have a far less inhibiting effect upon discourse than do governmental requirements that restrict the sender's ability to reach an audience. *Compare Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970) *with Lamont v. Postmaster General*, 381 U.S. 301 (1965). Here, the criminal penalties of the CDA, and the financial and other burdens imposed by its affirmative defenses, will severely restrict the spontaneous discussions and broad citizen participation so characteristic of computer-mediated communications. Because less restrictive alternatives exist that will achieve Congress' objectives, the CDA cannot survive strict scrutiny.

CONCLUSION

Computer-mediated communication presents an ideal medium for the free exchange of ideas and messages by ordinary citizens, and creates an unprecedented forum for on-going discourse across a wide a variety of subject matter (from polemic and political to personal, from commercial to academic). This exchange of views and expression by the public lies at the very core of the First Amendment.

Congress enacted the CDA with little, if any, consideration of the CDA's effect upon the spontaneous, interactive discourse so essential to the First Amendment. Instead, Congress simply imported regulations developed in the context of qualitatively different media. These regulations have a much more substantial effect on citizen discourse when applied to computer-mediated communications than these regulations have in the context of previous forms of electronic media.

The exciting new technology of computer-mediated communications should be permitted to flourish, as it has in the past, as a unique and empowering marketplace for ordinary citizens to form electronic communities by sharing meaning with one another.

Respectfully submitted,

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